Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Petitions for Declaratory Ruling Filed by BellSouth and Alabama 911 Districts Regarding the Meaning of the Commission's Definition of Interconnected VoIP in 47 C.F.R. § 9.3 and the Prohibition on State Imposition of 911 Charges on VoIP Customers in 47 U.S.C. § 615a-1(f)(1)	WC Docket No. 19-44

AT&T'S REPLY COMMENTS

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INTRODUCTION AND SUMMARY

The comments demonstrate the need for prompt Commission action to resolve legal disputes that affect the entire communications industry. The participation of USTelecom, NCTA, and the Voice on the Net Coalition shows the industry-wide importance of these issues, which are presented in more than a score of pending cases throughout the country. Windstream, for example, notes (at 2) that it is involved in 27 separate cases raising similar issues, and that "[h]undreds of telecommunications providers are joined in these lawsuits or related ones." Bandwidth similarly reports (at 4) that it, too, "has been named in" "dozens of such cases, many or all of which are linked to a consultant who stands to personally pocket a significant portion of any monetary recoveries." The plaintiffs in those other cases — which include a company founded by the consultant behind all those lawsuits — have thus far declined to participate in this proceeding. That is because, as Verizon explains (at 1), they hope instead to have these important issues of federal law decided through potentially "inconsistent state-by-state and even locality-by-locality application" of the Communications Act and the Commission's rules.

The overwhelming majority of the comments also support the declaratory rulings that BellSouth seeks, and reject the declaratory rulings the Districts seek.

First, the Commission should declare that a voice service that is not transmitted to the customer's premises over the last mile in IP format (e.g., in TDM format) cannot be VoIP. The Districts now explicitly concede (at 2-3) that this is correct, and no commenter disagrees. Despite that widespread agreement, such a declaration is still necessary because plaintiffs in the other pending 911 cases are not bound by the Districts' concession and have not abandoned their argument that PRI service transmitted in TDM format to the customer's premises is actually interconnected VoIP. That declaration also would not affect long-standing state statutes and

regulations governing 911 charges for traditional TDM services, which the Texas 9-1-1 Entities correctly note are not at issue here.

Second, the Commission should declare that § 615a-1(f)(1) preempts state laws that impose a higher total dollar amount of 911 charges on VoIP customers than on similarly situated non-VoIP customers. Multiple commenters agree with AT&T that the Districts' contrary interpretation of § 615a-1(f)(1) would imperil the core federal communications policy of facilitating the transition to IP communications networks.[1] Indeed, under the Districts' view, a state could cap 911 charges on non-VoIP customers at 50 per month while subjecting VoIP customers to thousands of monthly charges (as plaintiffs in South Carolina claim that state has done). In § 615a-1(f)(1), Congress clearly preempted states from discriminating against VoIP services in such a manner.

Third, the Commission should reject the Districts' interpretation of the word "requires" in § 9.3. As the Texas 9-1-1 Entities correctly note (at 4), that interpretation is inconsistent with the normal meaning of the word "requires" and raises "public safety and public interest" concerns that the Districts' ignore in their consultant's efforts to divert a substantial portion of allegedly due 911 charges into his own pocket. In addition, as multiple commenters explain, if the Commission rules that § 615a-1(f)(1) preempts state statutes that impose discriminatory 911 charges on VoIP customers, it need not reach this final question: the only reason the Districts and other plaintiffs adopted their expansive definition of interconnected VoIP is because they claim further that state laws require VoIP customers to pay massively higher total 911 charges than similarly situated non-VoIP customers and that such laws are not preempted.

[1] *See* NCTA Comment 2-3; Windstream Comment 6; USTelecom Comment 6; VON Comment 3; CenturyLink Comment 11.

ARGUMENT

I. THE COMMISSION SHOULD DECLARE THAT TRANSMISSION OF VOICE SERVICE IN IP OVER THE LAST MILE IS NECESSARY FOR A SERVICE TO CONSTITUTE VoIP

A voice service that transmits voice communications to the customer's premises over a last mile facility in any format other than IP (e.g., TDM) is not interconnected VoIP or any other kind of VoIP. Commenters uniformly agree with this.[2] And the Districts, despite their position in the federal court and ambiguities in their Petition,[3] now do as well: they "agree[] that any service that does not include internet protocol in the last mile is not an IVoIP service."[4]

However, a declaratory ruling from the Commission is still necessary because plaintiffs in other 911 cases are not bound by the Districts' concession. In particular, Phone Recovery Services ("PRS"), the plaintiff in the stayed Florida and Pennsylvania Actions, has alleged that even TDM-delivered PRI service is actually interconnected VoIP.[5] But PRS did not file comments. Nor did any of the other local governments that hired PRS or its principal, Roger

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[2] *See* BellSouth Pet. 12-15; AT&T Comments 3-7; USTelecom Comments at 9-10; Verizon Comments at 5-7; Windstream Comments at 12.

[3] *See* AT&T Comments 4-7.

[4] Districts Comments 2-3. The Districts, however, continue to assert (at iv & n.2) that BellSouth is lying when it states (Pet. 13 n.18) that it did not offer IP-enabled business voice service in Alabama during the period covered by the Districts' lawsuit. The Districts note (at iv & n.2) that a different AT&T entity (AT&T Corp.) offers a business VoIP service known as IP Flex. We agree and pointed to the same business VoIP service in our comments. *See* AT&T Comments 19 n.27. IP Flex is also provisioned in a manner consistent with the configurations depicted in Scenario 5a, 5b, and 5c, *see* BellSouth Pet. 13 n.18, 16 n.22, not Scenario 4b as the Districts appear to contend (at iv). But AT&T Corp. is not a defendant in the Alabama Action, and the Districts identify no evidence supporting their assertion that BellSouth billed AT&T Corp.'s IP Flex customers in Alabama. The Districts simply refuse to accept that their contingency-fueled complaint is based on a misunderstanding of BellSouth's service offerings. *See* AT&T Comments 4 & n.3.

[5] *See* Allegheny Am. Compl. ¶ 58 ("Given the FCC's definition of VoIP, most business accounts – even accounts that providers label as 'PRI' – fall within the FCC's definition of VoIP."); Florida AT&T Am. Compl. ¶ 50 (same).

Schneider, and then filed lawsuits against telephone companies based on his theories. Yet these plaintiffs are all aware of this proceeding — among other things, PRS's counsel in the Florida and Pennsylvania Actions participated in structuring this proceeding.[6] Their decision not to participate despite that knowledge demonstrates the need for the Commission to issue a declaratory ruling to resolve the controversy pending in the lawsuits they filed.

The Commission, however, can and should ignore the Districts' argument (at 3-5) that packet-switched services that do not use Internet Protocol are sufficiently similar to VoIP to constitute a "similar service" within the meaning of § 11-98-5.1(c) of Alabama's 911 law. The Districts acknowledge (at 5) that the interpretation of Alabama's 911 law is a matter for the Alabama federal court. But they ignore that the federal court already rejected the Districts' interpretation when it granted BellSouth's motion for a primary jurisdiction referral. Alabama adopted § 11-98-5.1(c), which addresses 911 charges due from customers of "VoIP or similar service," before the Commission issued the *VoIP 911 Order*. The federal court held that, because the Commission in that order "allowed states to impose 911 fees on services that constitute interconnected VoIP" and because "Congress has reduced that decision to law" in § 615a-1, the statutory phrase "VoIP or similar service" "must be read" to mirror the Commission's definition of interconnected VoIP.[7]

II. THE COMMISSION SHOULD DECLARE THAT § 615a-1(f)(1) PREEMPTS DISCRIMINATORY VoIP 911 CHARGES, WHETHER BASED ON THE TOTAL NUMBER OF CHARGES OR THE RATE PER CHARGE

Congress preempted state statutes that impose a higher total dollar amount of 911 charges on VoIP customers than on similarly situated non-VoIP customers. The overwhelming majority

[6] *See* BellSouth Pet. 7 n.8.

[7] Primary Jurisdiction Referral Order at 10-11 (Dkt. 52), https://bit.ly/2M72itn.

of commenters agree.[8] As NCTA explains (at 2-3), discriminatory 911 charges on VoIP service "discourage customers from switching from legacy TDM-based services to VoIP services, thereby undermining the federal policy of promoting the deployment and adoption of VoIP and other IP-based services." USTelecom similarly explains (at 6) that endorsing the Districts' interpretation of § 615a-1(f)(1) "would directly undermine the Commission's long-standing policy of promoting VoIP as a more cost-effective tool." The Districts' comments contain no further defense of that interpretation, which is wrong for all the reasons AT&T and other commenters have identified.

Another Alabama District, from Madison County ("MCCD"), defends the Districts' position, but offers no argument based on either the text of § 615a-1(f)(1) or Congress's purposes in prohibiting states from discriminating against VoIP services through their 911 statutes. Instead, MCCD discusses a brief BellSouth filed in 2007 in a case MCCD brought against BellSouth. But, as MCCD acknowledges (at 4), BellSouth filed that brief before Congress enacted § 615a-1(f)(1), which is why BellSouth did not raise an argument based on that statutory provision. In addition, the only services at issue in that case were PRI and other channelized TDM services. The district court agreed with BellSouth that those "channelized service[s] [are] not a similar technology to VoIP" and, therefore, were not subject to the Alabama statutory provision setting the 911 charges due from VoIP customers.[9] With that ruling in place, neither the court nor BellSouth had reason to address whether § 615a-1(f)(1) preempted that Alabama statutory provision, as it did not apply to any service at issue in the case.

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[8] *See* NCTA Comments 1-4; Windstream Comments 6-11; Verizon Comments 9-10; USTelecom Comments 4-8; VON Comments 3-5; Bandwidth Comments 6; CenturyLink Comments 9-13; AT&T Comments 13-22.

[9] *Madison Cty. Commc'ns Dist. v. BellSouth Telecommunications LLC*, 2009 WL 9087783, at *8 n.43 (N.D. Ala. Mar. 31, 2009).

More recently, an Alabama state court *rejected* MCCD's argument about the meaning of Alabama's 911 law. The court held that Alabama's law 911 law required both VoIP and non-VoIP customers to pay 911 charges based on the extent to which a customer "can simultaneously access E911 services."[10] Having interpreted Alabama's law *not* to discriminate against VoIP customers, that court also had no reason to address the preemption question. Despite that state court decision, the Districts suing BellSouth continue to insist that Alabama's 911 law required VoIP customers to pay many more 911 charges than similarly situated non-VoIP customers. And plaintiffs in Florida, Pennsylvania, and South Carolina, among other jurisdictions, are making the same argument about the 911 laws in those states.

MCCD also asserts (at 6) that the Commission's interpretation of § 615a-1(f)(1) should apply only prospectively. But as the D.C. Circuit held in *Qwest Services Corp.*, the Commission can prevent a declaratory ruling from applying retroactively only on a finding of "manifest injustice" — a finding that receives "little or no deference" from courts.[11] MCCD makes no attempt to meet that standard, instead relying on pre-*Qwest* decisions. Nor could MCC satisfy the demanding standard for finding manifest injustice. As the D.C. Circuit explained in *Qwest* in reversing a Commission finding of manifest injustice, that standard requires the identification of "settled law contrary to the rule established in the adjudication."[12] MCCD identifies no settled law holding that § 615a-1(f)(1) preempts only those state statutes that set different per unit 911 charges for VoIP and non-VoIP services — there is none. Even if MCCD asserted a "mere lack

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[10] Order at 18, *Madison County Communications Dist. v. ITC DeltaCom, Inc.*, CV 2014-904855.00 (Ala. Cir. Ct. Jefferson Cty. Apr. 25, 2018). MCCD settled shortly after the court issued this decision.

[11] *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 539 (D.C. Cir. 2007).

[12] *Id.* at 540.

of clarity in the law," that "does not make it manifestly unjust to apply a subsequent clarification of that law to past conduct."[13] And MCCD ignores the manifest injustice that "nonretroactivity would inflict on" VoIP customers, who could be subjected to discriminatory state laws that Congress expressly preempted.

Finally, the Texas 9-1-1 Entities note (at 3) that, in some circumstances, "inherent differences between channelized . . . and unchannelized voice[] services" may make it difficult to make "exact comparisons" between VoIP and non-VoIP customers. But the disputes presented in the pending cases — none of which is in Texas — are not about such inexact comparisons, but instead arise from plaintiffs' allegations that state 911 statutes adopt facially discriminatory rules. In South Carolina, for example, the local government plaintiffs allege that, while non-VoIP customers must pay no more than 50 911 charges per month *no matter how much service they buy*, VoIP customers must pay one 911 charge per telephone number and could be subject to *thousands* of 911 charges each month.[14] In the Alabama, Florida, and Pennsylvania Actions, the plaintiffs allege that VoIP customers who purchase services that limit the number of concurrent calls they can place must pay 911 charges based on the telephone numbers they obtain, while non-VoIP customers must instead pay based on their concurrent calling capacity.[15] A Commission ruling that § 615a-1(f)(1) preempts such facially discriminatory state statutes, however, would pose no threat to CSEC Rule 255.4 in Texas. As the Texas 9-1-1 Entities note (at 3 & n.10), that rule on its face applies uniformly to VoIP and non-VoIP services.

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[13] *Id.*

[14] *See* AT&T Comments 16.

[15] *See id.* at 18-19 (describing business VoIP offering sold by concurrent calling capacity); Windstream Comments 15 (same).

III. VOICE SERVICES TRANSMITTED OVER THE LAST MILE IN IP ARE VoIP ONLY IF THE CUSTOMER ORDERS AND RECEIVES A VoIP SERVICE

A. The declaration that a voice service that does not use IP over the last mile is not any kind of VoIP leaves open only the question whether a provider's purely internal decision to use IP over the last mile causes a TDM service to qualify as interconnected VoIP. If the Commission holds that § 615a-1(f)(1) preempts state statutes that require VoIP customers to pay more in total 911 charges than a similarly situated non-VoIP customer, the Commission need not answer that question. As USTelecom explains (at 8):

> The only reason the Districts and the plaintiffs in these other litigations are asserting their interpretation of the Commission's interconnected VoIP definition is because they also contend that VoIP customers must pay many more 911 charges than similarly situated non-VoIP customers — thereby inflating their claimed damages. A Commission ruling confirming that any such state statute that allows for such disparate 911 charges is preempted would eliminate the sole basis for the Districts' and other plaintiffs' novel and incorrect interpretation of the Commission's rule.[16]

With the prospect of massively increased 911 charges eliminated, the Districts and other plaintiffs would have no reason to argue that services bought and sold as TDM are actually interconnected VoIP services.

B. But if the Commission reaches the issue of how its interconnected VoIP definition applies to voice services transmitted over the last mile in IP, it should issue a declaratory ruling endorsing BellSouth's position: such a service is VoIP only if the customer orders and receives a VoIP service. Put differently, a telephone company's internal provisioning decision to take advantage of the efficiencies IP transmission offers cannot convert into a VoIP service a TDM

[16] *See also* NCTA Comments 5-6; CenturyLink Comments 1, 16.

service that a customer orders and receives in TDM format.[17] Multiple commenters support that position,[18] which properly applies the terms of the Commission's interconnected VoIP definition.

The Districts are therefore wrong to assert (at 6) that BellSouth seeks to "*add[]* a fifth criterion to the established four-part definition of Rule 9.3." Instead, BellSouth asks the Commission to declare that a service "*[r]equires* Internet protocol-compatible customer premises equipment (CPE)" within the meaning of § 9.3 only when a customer orders and receives a VoIP service. Where the customer instead orders and receives a TDM service, that service does not "require" IP-compatible CPE merely because the telephone company unilaterally elects to *use* IP for its own internal reasons to transmit the voice traffic along a portion of the transmission path.[19]

In contrast, as the Texas 9-1-1 Entities correctly note (at 6), the Districts are "interpreting 'required' to mean 'permitted,'" which is contrary to any "plain reading of the language" of the Commission's interconnected VoIP definition. The Districts' interpretation of "requires" also would cause the identical TDM service, provisioned in the same way (IP over the last mile), to two different customers in two different buildings to be classified differently, based solely on the different location of the demarcation points in those two buildings: at the minimum point of entry in one building, while at each office suite in the other.[20] The Districts ignore this obvious consequence of their position and offer no legal or policy justification for such an arbitrary result.

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[17] *See* BellSouth Pet. 15-21; AT&T Comments 7-12.

[18] *See* Windstream Comments 11-14; Verizon Comments 2-8; USTelecom Comments 9-10.

[19] *See* BellSouth Pet. 19-21; AT&T Comments 8.

[20] *See* BellSouth Pet. 19; AT&T Comments 9; Windstream Comments 14.

The Districts erroneously claim (at 9-10) that the *Cardinal Order*[21] rejects BellSouth's interpretation of "requires." But Cardinal argued that, because it offered an entirely separate analog voice service that its customers *could have* purchased, the VoIP service that Cardinal's customers *actually purchased* did not qualify as VoIP. *Cardinal Order* ¶ 11. The Commission correctly rejected that argument, finding that "Cardinal's customers who chose the VoIP offering" actually received VoIP, so it did not matter that they had the ability "to choose a non-VoIP offering." *Id.* BellSouth's argument is instead that, when a customer "choose[s] a non-VoIP offering," that offering does not somehow require IP-compatible CPE or become interconnected VoIP when the telephone company — *not* the customer — chooses to provision that service over the last mile in IP, before converting it into the non-IP format the customer ordered. Nothing in the *Cardinal Order* suggests that a company's entirely internal provisioning decision can change the nature of the service its customer ordered.

In addition, as Verizon notes (at 3), the Commission traditionally classifies services based on what "the customer is actually buying, as well as the actual characteristics of the service." Where a customer orders a TDM service and receives that TDM service with no added IP functionality, the "actual characteristics" of the service make it TDM, not VoIP. The Districts cite no Commission order rejecting this approach, but assert (at 11-12) that AT&T and Verizon are wrong to draw lessons from the *IP-in-the-Middle Order*[22] because it "addressed entirely different issues." But BellSouth acknowledged as much, contending (Pet. 20) only that the decision "is instructive," even though it "address[ed] different questions from those presented

[21] Forfeiture Order, *Cardinal Broadband, LLC*, 27 FCC Rcd 7985 (Enf. Bur. 2012) ("*Cardinal Order*").

[22] Order, *Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd 7457 (2004) ("*IP-in-the-Middle-Order*").

here." Specifically, the Commission found there that, when a customer orders a TDM service and receives a TDM service with "no enhanced functionality" "due to the conversion to IP" resulting from the "internal[]" decision of the provider, the fact that the service is transmitted in part over IP is irrelevant to the classification of the service.[23] The same should be true when a customer orders and receives a TDM service that the telephone company routes over the last mile in IP for its own internal reasons.

C. The Districts continue to contend (at 6) that the Commission's demarcation point regulations should be used to determine whether a service is interconnected VoIP. But they do not even address — much less refute — BellSouth's showing that § 9.3 and the Commission's orders regarding interconnected VoIP do not rely on or mention the demarcation point regulations, which were promulgated at different times and for different purposes.[24] And they do not — and cannot — deny that the location of the demarcation point can vary on a building-by-building basis for reasons that have nothing to do with the nature of a service or whether it should qualify as VoIP (e.g., the age of the building or the choices of the building owner).[25]

The Districts also again rely (at 8) on the Communications Act's definition of customer premises equipment in 47 U.S.C. § 153(16). But the Districts ignore that the Commission, in adopting its interconnected VoIP definition, made no reference to § 153(16). As AT&T showed (at 11-12), when the Commission adopted that definition, it identified a much narrower set of equipment as "IP-compatible CPE" for purposes of § 9.3: "The term 'IP-compatible CPE' refers to end-user equipment that processes, receives, or transmits IP packets," such as "terminal

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[23] *IP-in-the-Middle Order* ¶¶ 12, 15, 17; BellSouth Pet. 20-21.

[24] *See* BellSouth Pet. 17-18; AT&T Comments 8-10.

[25] *See* BellSouth Pet. 18-19; AT&T Comments 9.

adapters," a "native IP telephone," or a "personal computer" with "softphone" software.[26] The Districts, therefore, are wrong to contend (at 8) that *any* equipment that is located "on the premises of a person (other than a carrier)" and that "is employed to originate, route, or terminate telecommunications" can satisfy the IP-compatible CPE prong of the interconnected VoIP definition.[27] In all events, that contention is inconsistent with the Districts' reliance on the demarcation point rules — it is undisputed that, under those rules, providers may locate equipment within a customer premises that is on the provider's side of the demarcation point and, therefore, is network equipment and not any kind of CPE.[28]

D. Finally, the Commission should reject the Districts' novel interpretation precisely because it would lead to an unprecedented expansion of the scope of the interconnected VoIP definition. Any such expansion in this proceeding would also apply to the many federal and state statutes and federal regulations that have incorporated the Commission's interconnected VoIP definition.[29] Yet the Districts say nothing about the implications of their position on those other laws and rules. And, as the Texas 9-1-1 Entities explain (at 4), the Districts' proposed expansion also raises "concern[s] from both a public safety and public interest perspective," because of the different substantive regulations regarding location validation that would

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[26] *VoIP 911 Order* ¶ 24 n.77.

[27] There is no merit to the Districts' suggestion (at 8) that Congress's decision to codify the Commission's interconnected VoIP definition in 47 U.S.C. § 153(25) causes CPE in 47 C.F.R. § 9.3 to have the same definition as CPE in 47 U.S.C. § 153(16). Congress defined the term interconnected VoIP service to have "the meaning given such term under section 9.3." 47 U.S.C. § 153(25). Congress thus retained — and did not change — the meaning the Commission gave to the term IP-compatible CPE in the *VoIP 911 Order*.

[28] The Districts offer no further defense of their argument (Pet. 20-21) that the Commission should adopt a presumption that all relevant equipment located at a customer's premises is on the customer's side of the demarcation point. As AT&T showed (at 10-11), the Commission could not lawfully adopt that presumption.

[29] *See* BellSouth Petition 22 (citing statutes and rules).

suddenly apply to a service sold as TDM but recategorized as an interconnected VoIP service. The Districts' novel position — driven by their contingency fee consultant's desire to divert 911 funds to personal profit — ignores those serious concerns.

CONCLUSION

The Commission should act promptly to grant BellSouth's petition for declaratory ruling and deny the Districts' petition.

Respectfully submitted,

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